ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION III

CACR06-210

MARCH 7, 2007

JAMES A. ROBINSON, JR.

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE JACKSON COUNTY CIRCUIT COURT
[CR-2004-97]

HONORABLE HAROLD S. ERWIN, JUDGE

AFFIRMED

Appellant James A. Robinson, Jr., was tried and convicted on three charges: (1) possession of a controlled substance, cocaine, near certain facilities; (2) possession of drug paraphernalia with intent to use; and (3) possession of a controlled substance, marijuana. He was sentenced to twenty years in the Department of Correction on the possession of the cocaine conviction and sentenced to ten years on the possession of drug paraphernalia with intent to use to run consecutively. The trial court then added an additional two years to appellant's sentence under the enhanced penalties provision of Arkansas Code Annotated § 5-64-411 (Repl. 2006). At trial and on appeal, appellant's counsel argued that section 5-64-411 was void for vagueness and unconstitutional because it merely provides that an individual may be subject to an enhanced penalty but fails to provide the procedure as to how the enhanced penalty shall be imposed, such as whether the jury or trial judge should impose the penalty, and then ultimately fails to provide for any terms to the length of the sentence. We find

no error and affirm.

We have recently articulated our standard for reviewing the constitutionality of statutes:

> Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. If it is possible to construe a statute as constitutional, we must do so. Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. We have said that a law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. [Citations omitted.]

Osborne v. State, 94 Ark. App. 337, ___ S.W.3d ___ (2006).

The enhanced sentencing statute, found at Ark. Code Ann. § 5-64-411 (Repl. 2006) and challenged by appellant, provides as follows:

> (a) Any person who commits an offense under § 5-64-401(a) by selling, delivering, possessing with intent to deliver, dispensing, manufacturing, transporting, administering, or distributing a controlled substance may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed on or within one thousand feet (1,000') of the real property of:
>
> (1) A city or state park;
>
> (2) A public or private elementary or secondary school, public vocational school, or private or public college or university;
>
> (3) A skating rink, Boys Club, Girls Club, YMCA, YWCA, or community or recreation center;
>
> (4) A publicly funded and administered multifamily housing development;
>
> (5) A drug or alcohol treatment facility;
>
> (6) A day care center;
>
> (7) A church; or
>
> (8) A shelter as defined in § 9-4-102.
>
> (b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person convicted under this section is not eligible for early release on parole for the enhanced portion of the sentence.

(d)(1) Property covered by this section shall have a notice posted at the entrances to the property stating:

"THE SALE OF DRUGS UPON OR WITHIN ONE THOUSAND FEET (1000') OF THIS PROPERTY MAY SUBJECT THE SELLER OF THE DRUGS TO AN ADDITIONAL TEN (10) YEARS IMPRISONMENT IN ADDITION TO THE TERM OF IMPRISONMENT OTHERWISE PROVIDED FOR THE UNLAWFUL SALE OF DRUGS."

(2) However, the posting of the notice is not a necessary element for the enhancement of a sentence under this section.

(e) As used in this section, "recreation center" means a public place of entertainment consisting of various types of entertainment, including, but not limited to, billiards or pool, ping pong or table tennis, bowling, video games, pinball machines, or any other similar type of entertainment.

Although his argument is undeveloped, appellant cites cases that support the proposition that this court must determine a statute is void for vagueness when the statute lacks ascertainable standards of guilt such that a person of average intelligence must necessarily guess its meaning and differ as to its application. *See Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995). To the extent that appellant may be arguing that he is one of the "entrapped innocent" who has not received fair warning of his duty under the statute, his argument must fail. *See Bowker v. State*, 363 Ark. 345, ___ S.W.3d ___ (2005). Arkansas Code Annotated § 5-64-411 (Repl. 2006) provides for enhanced penalties of offenses committed under § 5-64-401(a) within 1000 feet of certain protected facilities. One of appellant's convictions was under § 5-64-401(a) for possession of a controlled substance (cocaine) with intent to deliver. This offense was committed approximately 741 feet from a church, and a church is a protected facility under § 5-64-411(a)(7). Appellant's conduct falls clearly within the prohibition of the statute. When an individual's conduct falls clearly within the conduct proscribed

by the statute, he cannot complain that the statute is unconstitutionally vague as applied to him. *Bowker, supra*.

Appellant also proposes that the statute states that the convicted individual *may* be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years, but there are no guidelines for the imposition of the enhancement. The statute unequivocally enhances the sentence by an "additional term of imprisonment of ten (10) years when an offense under § 5-64-401(a) is committed on or within one-thousand feet (1000') of the real property of ...a church." Given that appellant's conduct fell clearly within the statute's prohibition, we find no error as to that aspect of his argument.

Appellant's conclusion also requests that, in the alternative, we should find that the trial court erred when it applied the statute on its own without the guidance of any jury instructions. Appellant presents no citation to authority or argument in support of that alternative premise, and it is not apparent that the argument is well taken; therefore, we do not consider it. *See Cook v. State*, 321 Ark. 641, 906 S.W.2d 681 (1995).

Accordingly, we find no error and affirm.

GLOVER and MARSHALL, JJ., agree.